FILED
AUG 23 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 341

SANTIAGO ALBANESE D'IMPERIO, *Petitioner*

v.

SECRETARY OF THE TREASURY OF PUERTO RICO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit which affirmed a judgment of the Supreme Court of Puerto Rico refusing to set aside a tax deficiency assessed against petitioner for the year 1949.

OPINIONS BELOW

The opinion of the Court of Appeals, set forth in the Appendix, infra, is reported at .
The opinion of the Supreme Court is reported in 76 D.P.R. 324.[1]

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[1] Not yet reported in English edition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 24 of the Income Tax Statute of Puerto Rico (Act No. 74 approved August 6, 1925, as amended by Act No. 31, approved April 12, 1941, and effective from January 1st, 1940) seeking to impose an income tax on appellant, and providing for consolidating to his income for the year 1949 income accruing to and derived from the separate property of his wife, does violence to the "due process clause" of the Fourteenth Amendment to the Constitution of the United States, as well as to Article 2, Section 7 of the Constitution of the Commonwealth of Puerto Rico and to Section 2, paragraph 1 of the Organic Act of March 2, 1917, known as "The Jones Act". 39 Stat. 951.

STATUTES

1. The "Due Process Clause" of the Fourteenth Amendment of the Constitution of the United States.

2. Article 2, Section 7 of the Constitution of the Commonwealth of Puerto Rico.

3. Section 2 of the Organic Act of March 2, 1917, known as "The Jones Act". 39 Stat. 951.

4. Section 24 of the Income Tax Statute of Puerto Rico (Act No. 74, approved August 6, 1925, as amended by Act No. 31, approved April 12, 1941, and effective from January 1st, 1940).

5. Sections 155 to 162, 761-763, and 1267-1278 of the Civil Code of Puerto Rico, 1930 Edition.[2]

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[2] The provisions of the Civil Code of Puerto Rico are set out at length in the appendix hereto.

STATEMENT

The petitioner seeks to set aside and annul a tax deficiency assessed against him by the Secretary of the Treasury of Puerto Rico for the year 1949, resulting from the consolidation of the separate income reported respectively by himself and his wife for said year, which income after consolidation with that of his wife and recomputation resulted in a higher tax.

According to an agreed statement of facts filed of record in the Court of Appeals, the appellant and his wife, both of whom were widowed, and each then having minor children living from their respective former marriages, prior to their marriage entered into a legally sanctioned and bona fide antenuptial agreement in which all requisite legal formalities were observed, pursuant to the provisions of Sections 1267 to 1278 of the Civil Code of Puerto Rico (1930 Ed.) and did establish a complete and absolute separation of each spouse's property and income and expressly negated and disavowed any intention that their marriage to be should be governed or controlled by the legal conjugal partnership system.[3]

The parties to said antenuptial agreement in effect were married to each other on January 27, 1949, and the said antenuptial agreement remained in full force and effect without suffering any modification, alteration or amendment. No questions have been raised that the agreement was one entered into in good faith

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[3] Marriages in Puerto Rico, *in the absence of antenuptial agreements pursuant to Sections* 1267 to 1278 of the Civil Code, are presumed to be governed by community property concepts.

or that the contracting parties have dealt with their respective properties as provided in the agreement.[4]

The Petitioner and his wife, in reporting their respective incomes for the year 1949, filed separate returns and each paid the corresponding tax as computed on their individual income.

The Respondent, on December 14, 1951, notified Petitioner with a tax deficiency on his return for the year 1949 amounting to $551.63. Petitioner, after exhausting the administrative remedies, petitioned the extinct Tax Court of Puerto Rico to review Respondent's action and annul and set aside the said deficiency.

The Superior Court, Successor to the Tax Court, denied the petition and sustained the deficiency by judgment entered February 5, 1953, holding that The Legislature of Puerto Rico for tax purposes *could make* an economic unit of husband and wife due to assumed considerations and advantages of the matrimonial relationship (*even though the agreement which governed the matrimony allowed each one of the spouses to have a vested or separate interest in their respective properties, separate from the other*) without violating the constitutional provision prohibiting the taking of property without due process.

An appeal was taken to the Supreme Court of Puerto Rico and said court on the 13th day of April 1954

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[4] Respondent in his brief filed in the Circuit Court states:
"But appellee does not question appellant and his wife's rights to enter into agreements as to the private consequences of their marriage, as they could also lawfully agree as to the absolute power of each one to dispose of, manage and control their separate property or income, as they could agree as to other aspects of their marriage."

entered judgment affirming the Superior Court, sustaining the validity of the tax deficiency.

In passing upon the constitutional question raised in the appeal the Supreme Court of Puerto Rico ruled that there was no constitutional prohibition which impeded the Commonwealth of Puerto Rico of treating the separate property of each spouse as one economic entity irrespective of the pre-marriage contract establishing the separation of property between husband and wife and of imposing a tax on the combined income.

REASONS FOR GRANTING THE WRIT

1. The validity or present authority of *Hoeper* v. *Tax Commissioner of Wisconsin,* 284 U. S. 206 is in issue. To determine its proper scope or remaining influence or value as a precedent, it is appropriate that this Court grant certiorari.

While it is true that the many attempts to extend the *Hoeper* case to situations not encompassed within its peculiar facts have been repeatedly resisted by this Court,[5] the *Hoeper* case, *on its facts,* stands unchallenged.

The Circuit Court has for all practical purposes dismissed the *Hoeper* case as retaining no authority whatsoever and it is submitted that due to the similarity of the statutory provisions and the facts of the *Hoeper* case to the present one, it becomes extremely

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[5] *Helvering* v. *Horst,* 311 U.S. 112; *Burnet* v. *Leininger,* 285 U.S. 136; *Burnet* v. *Wells,* 289 U.S. 670; *Helvering* v. *Clifford,* 309 U.S. 331; *Helvering* v. *Stuart,* 317 U.S. 154.

important for this Court to re-examine *Hoeper* v. *Tax Commissioner of Wisconsin* (supra).[6]

2. Petitioner's income tax as in the *Hoeper* case, has been measured, not alone by his own income, but, in part, by that of another and in the light of the opinions of the lower courts it has become extremely important that the Supreme Court again pass upon this important and fundamental constitutional concept.

3. The statutes involved in the *Hoeper* case, supra and in the present case are substantially similar and read respectively as follows:

The Wisconsin statute;

"Sec. 71.09 (4) (c) 'Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in subsection (2) of S. 71.05 shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income.' "

The Puerto Rico statute;

"Section 24 (b) If a husband and wife living together have a net income for the taxable year of $2,000, or over, or an aggregate gross income for such year of $5,000 or over, the total income of both shall be included in a single joint return, and the normal and additional tax shall be computed on the aggregate income. The net or gross

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[6] *Hoeper* v. *Tax Com. of Wisc.* is still cited as controlling precedent; *Commissioner* v. *Clark* (1953), 202 F. 2d at 100; *Caldwell* v. *Campbell,* 218 F. 2d at 571, and many other Circuit District and State Courts.

income received by anyone of the spouses shall not be divided between them."

4. The antenuptial agreement entered into by petitioner and his wife is admittedly bona fide and indisputably has effected *a real and binding absolute separation* of property and income between husband and wife under the substantive law of Puerto Rico and is a legally enforceable agreement as between the spouses themselves and equally affects the rights of their children, creditors and other third parties.[7]

5. The agreement of the parties being valid and sanctioned by existing law and having effected a complete separation of properties and incomes has in effect created two separate and distinct economic units which may not be arbitrarily ignored, amalgamated or joined for purposes of taxation, without at least first amending or repealing the substantive laws which authorize and sanction such agreements.[8]

6. The provisions of the Civil Code of Puerto Rico cited in note 3, Page 3, supra, authorize persons about to contract matrimony to elect *before their marriage* whether they also desire to enter into an economic partnership, in which event they need do nothing, or whether on the contrary, they prefer not to join in such

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[7] The Supreme Court of Puerto Rico at Page 327 of its opinion (Spanish Edition) states:

"Both the appellant and the appellee admit that the problem presented in the instant case is new in this jurisdiction. We agree."

[8] No doubt that the legislature has the power to and could well do what the lower courts have said it could, but the fact remains that it has not seen fit to do so, and contrary to the opinion of the courts below the section of the Puerto Rico Income Tax Act relied upon does not accomplish the end sought.

partnership and instead create for themselves two separate and distinct economic units. The petitioner and his wife elected the latter.

7. No evidence having been offered and no finding having been made that the antenuptial agreement was a sham or a mere device to avoid taxes the same stands as a legally binding agreement against which no suppositious presumptions may be entertained.[9]

8. The test of ownership still continues to be the basis for taxation of income, and income is taxable to him who owns it. Family relationships do not create a status[10] which by themselves determine tax questions.

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[9] Appellee in his brief in the Circuit Court states:—

"Furthermore, we cannot agree with appellant in that the only rational constitutional basis on which the appealed decision can stand is that the pre-marital agreement is merely a sham or device to avoid taxation. Certainly, there is in the case at bar no evidence presented by the appellee to the effect that the pre-marital agreement is a purely artificial device to split income producing properties in two separate channels in order to minimize surtax. But no one can question that, regardless of the purpose, that result was achieved. And no such evidence was presented, nor did it appear necessary to do so in the Horst case, nor in the Eubank case, nor in the Tower case, nor in any one of the cases where the contention was unsuccessfully made that legal ownership is the criterion of taxability."

[10] *Commissioner* v. *Culbertson*, 337 U.S. 733.

"In plain English, if an arrangement among men is not an arrangement which puts them all in the same business boat, then they cannot get into the same boat merely to seek the benefits of §§ 181 and 182. But if they are in the same business boat, although they may have varying rewards and varied responsibilities, they do not cease to be in it when the tax collector appears."

337 U.S. at 754.

The Courts below have recognized the existence of a valid separation of property under valid law, but refuse to give it effect when confronted with the tax statute.

9. No provision of the Income Tax Act of Puerto Rico can be pointed to which even impliedly can be said to contemplate an amendment to the sections of the Civil Code (referred to in the notes supra) which allow prospective spouses *prior to their intended* marriage to arrange by antenuptial agreement for a separation of their present or future properties and income and to provide for the creation of two separate and distinct economic units with all the safeguards that the Civil Code throws around these agreements and all of which were scrupulously observed by petitioner and his wife.

10. The antenuptial agreement in the present case must be examined not only having regard to the economic convenience of Petitioner and his wife, but by far more weighty considerations involving individual rights of inheritance and to income by children of each of the spouses begotten from their respective former marriages.[11] Examined under this light,[12] *even in the* absence of a tax statute, or a presumed tax avoidance motive, it will be observed that the antenuptial agreement was a real and necessary instrument *to preserve the separate estates and the income therefrom to those who owned them* prior to the marriage, i. e. a purpose far superior to that of avoiding a tax (since the tax after all could only reach the income); the agreement

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[11] See Civil Code provisions set out in Appendix.

[12] Substantial property rights belonging to the respective children of each spouse by former marriages and held in common with their respective parents prior to their second marriage are revealed by the record and agreed statement of facts below.

of the parents guaranteed the retention of the corpus of the property in their original owners and prevented future intermingling and confusion of rights and titles as between children of different marriages and preserved to them what was theirs before and which they had acquired and were enjoying as a result of having inherited said properties from their deceased parents.

11. The decision whose review is sought, if allowed to stand, will seriously and irreparably upset, affect and impair substantial property rights of the children of each spouse and compel economic dislocations and complications not capable of readjustments and bring about an unlawful taking of said property or of the income therefrom.

12. The provisions of the Civil Code referred to in this petition are unquestionably the prevailing substantive law of Puerto Rico unaltered and unamended since Spanish times. No legal or statutory justification therefore exists for the statement of the Circuit Court of Appeals that Puerto Rico has enacted legislation *"forbidding spouses from thereafter escaping the normal income tax consequences of their marital relationships by contractual arrangements entered into before or after the marriage."*

This statement of the Circuit Court must refer to Section 24 of the Income Tax Act of Puerto Rico (since there is no other statutory provision upon which such statement can be predicated), and it is submitted that a general tax statute which contemplates the normal Puerto Rican marriage relationship ordinarily contracted under the conjugal partnership system cannot and should not be used as statutory authority for upsetting deep rooted fundamental concepts of long standing under Civil Law.

13. To permit a general tax statute to invade by implication fundamental systems of property ownership, inheritance, usufruct and other cardinal provisions of an integrated system of law is to disrupt the established substantive law of a state to conform it to the tax statute, and to permit the "tail to wag the dog".

14. Both the Circuit Court and the Supreme Court of Puerto Rico have unquestionably given more weight to the case of *Ballester* v. *Court of Tax Appeals,* 142 F. 2d 11, cert. denied, 323 U. S. 723, than to *Hoeper* v. *Tax Commissioner of Wisconsin,* supra, although both courts frankly admit that the *Ballester* case does not rule this one.[13]

15. Lastly, a construction is placed by the Circuit Court on the provisions of the Civil Code of Puerto Rico, authorizing the separation of properties of spouses by antenuptial agreements, which clearly appears unwarranted. In this connection reference is made to a phrase in section 1268 of the Code (See appendix p.) that "the parties to antenuptial contracts can not stipulate anything contrary to law . . .". Clearly, such a provision refers to acts "malum in se" or "malum prohibitum", but never, we submit, to

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[13] "Basically the appellant's contention is that the antenuptial agreement between himself and his wife is clearly valid under local law (indeed, he says that there is not even an iota of evidence that its purpose was to avoid taxes or that it was in any respect a sham or subterfuge) and that, by its clear terms, the agreement effected a complete separation not only of the properties but also of the incomes of the spouses. Wherefore he says that to require him to pay a tax on his and his wife's combined income is to require him to pay a tax measured by the income of another which the Supreme Court held in *Hoeper* v. *Tax Commission,* 284 U.S. 206 (1931) violated the due process clause of the Fourteenth Amendment." See page Appendix.

thwart the very nature of the acts and consequences that the statutory provisions contemplate.

Should Section 24 of the Income Tax Act invoked, be construed as an amendment to the provisions of the Civil Code of Puerto Rico, which we submit it is not, then such section 24 would do violence to the provisions of the Organic Act of Puerto Rico, Sect. 34; Mar. 2, 1917, C. 145, Sect. 34, 39 Stat. 960; amended June 24, 1948, C. 610, Sect. 3, 62 Stat. 580.[14]

Certiorari is appropriate herein to authoritatively settle the proper scope and present validity of *Hoeper* v. *Tax Commissioner of Wisconsin,* supra.

CONCLUSION

In view of the importance of the questions presented, as it affects a serious attempt to measure one person's income by that of another, it is respectfully submitted that a writ of certiorari should issue to review the judgment below and re-examine the present status as a judicial precedent of *Hoeper* v. *Tax Commissioner of Wisconsin,* supra.

Respectfully submitted,

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[14] "No bill except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.

No law shall be revived, or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length."